DIGEST OF IMPORTANT DECISIONS

REPORTED IN DECEMBER, 1892.

Cross References, etc., by HENRY N. SMALTZ.

The following DIGEST is rather an indication of what the editors and those who are selecting the cases hope to make it than an example of the completeness which it is hoped will be attained in the February and subsequent issues of THE AMERICAN LAW REGISTER AND REVIEW. Thus the reader will observe that cases on MEDICAL JURISPRUDENCE, RAILWAYS AND TRANSPORTATION COMPANIES, PERSONAL RELATIONS, CONFLICT OF LAWS, INTERNATIONAL LAWS and INSURANCE are omitted, while CORPORATION CASES have not been selected by Mr. John A. McCarthy, who will, in future, take charge of this important branch. By the February number we expect to have the Department in thorough working order. Any suggestions from our subscribers, as to divisions of departments and cross references, will be most welcome.

COMMERCIAL LAW.

Cases selected by FRANCIS H. BOHLEN.

ASSIGNMENT. See EQUITY, 6.

BAILMENT. See CRIMINAL LAW, 4.

BILL OF LADING.

1. *Purchaser for Value.*

A & Co., merchants of New York, had advanced money through their agent, B, to tomato growers upon their 1883 crop, which was canned and stored, the warehouse receipts being made out to B's "agent" and given to him. He had power to sell the tomatoes, and did so sell some. Instead of turning in the proceeds to A he, on his own account, invested the money in the 1884 crop, which was warehoused in the name of B's agent. B obtained loans upon receipts for 1883 and 1884 from the defendant bank, indorsing to them the receipts. The debt not being paid the tomatoes were sold. *Held*, that A might recover against bank the amount realized from the sale of 1883 crop. They were goods of A. B had no title in them, and though he had authority to sell could not pledge them without A's consent. The bank had notice from warehouse receipts that B was not owner, and the burden rested upon them to ascertain the actual ownership and whether B had authority to pledge. As to proceeds of sale of 1884 crop, A could not recover. B, by misapplying A's money to their purchase, might give A equitable lien upon them so far as his money was used in the purchase, but the goods were bought by B for himself, and not for A, and B never intended to give A a title to them, nor did A know of the purchase, and the title was in B. Theuber *v.* Cecil Nat. Bank, MORRIS J., 52 Fed. Rep., 513.

BILLS AND NOTES. See *Infra*, 6; EQUITY, 1.

CONTRACTS. See CONSTITUTIONAL LAW, 3, 4, 10.

2. *Abandonment of,—Theory of Future Profits.*

To justify the abandonment of the future performance of a contract, and to bring suit to recover future profits where performance is a condition precedent to the right to receive profits, the conduct of the defendant must be such as prevented the innocent party from executing the contract. It is not enough that substantial provisions of the contract have been broken. Lake Shore, etc., Rwy. Co. *v.* Richards, Supreme Court of Illinois, Oct. 31, 1892, BAILEY, C. J., 32 N. E., 402.

The same breach which may justify the party not in default in rescinding the contract, will not entitle him to refuse farther performance and yet maintain an action for future profits.

In the Federal Courts, when a party fails to perform every material part of any one installment of a divisible contract, the other party may treat the contract as at an end and refuse to perform his part farther. Wright *v.* Norrington, 115 U. S., 188 (also in N. Y. and Pa.); Pope *v.* Porter 102, N. Y.; Rugg & Bayan *v.* Moore, 110 Pa., 236); but to entitle a party not in default to future profits it must be shown that his performance was prevented by the act of the party committing the breach. U. S. *v.* Behan, 110 U. S., 388. It is not necessary that the performance be rendered physically impossible, an act equivalent to a breach by anticipation of the entire contract is sufficient. If such be shown, the entire contract is broken and damages for the breach of the entire contract, which, of course, would include the loss of future profits, may be recovered. The necessity of a tender of performance on the plaintiff's part is done away with by the defendant's declaration, express or implied, that he will not perform his part in return, for no one need perform his portion of a contract with the knowledge that he will not reap the consideration for his performance.

3. *Assignment of,—Indorsements in Bank—Title by Estoppel.*

C, as president of Bangor Co., sold to A a certificate of its stock, transferring it to him by an indorsement in blank. A kept his stock in same safe as one D, a broker, who stole the certificate and sold it to B for value and without notice. A and B both claimed to own stock. C and the Co. interplead. *Held* (1), Maine statute that transfer of shares of corporate stock by indorsement and delivery shall only be valid between parties thereto, does not render transfer void in this case. The parties are the transferrer C, and whoever is entitled to have his name inserted in blank indorsement, and between them transfer is valid, the suit being brought to ascertain who is so entitled. (2) That by keeping securities in same safe as D, who stole them, A did not so hold D out as having authority to deal with them as to mislead B, and so fall within the rule that where one of two innocent persons must suffer from fraud of third person, he must bear the loss who placed it in the power of third person to commit the fraud. (3) While certificates of stock indorsed in blank have a certain *quasi* negotiability, an innocent purchaser of a stolen certificate

does not acquire title against the owner as in case of negotiable promissory notes, etc. Decree that A's name be inserted in blank transfer in certificate, and Co. issue new certificate in return therefor: Bangor Light Co. *v.* Robinson, PUTNAM J., 57 Fed. Rep., 520.

4. *Breach of,—Damages—Mental Suffering.*

In an action against a railroad company for breach of contract to run a special train, the plaintiff claimed damages for "great distress of mind, anxiety, mortification and suspense" in failing to reach the bedside of a sick parent in consequence of said breach. It was held that the action could not be maintained: Wilcox *v.* Richmond and D. Rwy. Co., Circuit Court of Appeals of the United States, Fourth Circuit, October 11, 1892, HUGHES, J., 52 Fed. Rep., 264.

5. *Breach of,—Telegraph Companies—Delay in Transmitting Message.*

C left a despatch at defendant's telegraph office in S., to be forwarded to plaintiff at M. The despatch was: "Strauss gone to Howard. Gave man gold watch by mistake. Left no word with me. Store closed. Answer." Strauss was a clerk whom plaintiff had left in charge of his jewelry store in his absence, and during the night or early in the morning before the despatch was sent had robbed the store and absconded with the property, and the despatch was in relation to the absconding, but defendant's agent had no notice thereof. The despatch remained in the S. office an hour and a half and was then forwarded to the M. office, where it remained two hours before it was delivered, or any effort made to deliver it. *Held*, that plaintiff could not recover more than the cost of the message and incidental expenses, upon the principle that where two persons have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it: Western Union Tel. Co. *v.* Cornwell, Court of Appeals of Colorado, October 24, 1892, REED, J., 31 Pac. Rep., 393.

These cases follow Telegraph Co. *v.* Hall, 124 U. S., 244, and Griffin *v.* Colver, 16 N. Y., 489. The rule is that only such damages can be recovered as are the natural consequences of the breach of a contract under the circumstances known to the parties: BLACKBURN, J., Cory *v.* Thames Co., L. R., 3 Q. B., at p. 186. Where goods are shipped, the carrier is only liable for the ordinary result of delay. The fact that the shipper lost a more than ordinarily advantageous contract thereby can not affect the damages, the shipper not having notified the carrier of that fact: Hadley *v.* Baxendale, 9 Exch., 341. It is not necessary that the damage be actually contemplated by the parties as the consequences of the breach if they would naturally and in ordinary course result therefrom: Cory *v.* Thames Co., p. 189. The damages must be certain both in their nature and in respect to the cause from which they proceed.

6. *Contingent Contract—Delivery of Notes on Determination of Criminal Prosecution.*

Plaintiff, having bought certain property of one Ireland, sold the same, taking certain promissory notes in payment. Ireland was subsequently charged in a criminal prosecution with the larceny of said property as the bailee of defendant. Thereupon plaintiff delivered said notes to defendant, with the express agreement that defendant should retain them in case of Ireland's conviction, but that it should return them to plaintiff in case of Ireland's acquittal. Neither plaintiff nor defendant were implicated in said criminal charge, and the transaction concerning the delivery of the notes not being intended as a compromise of a criminal offence, nor an attempt to prevent the due administration of justice, it was held that the contract was not illegal, but that it was based upon a valid consideration, and that it could be enforced upon the happening of the contingency specified in the express agreement: Percheron-Norman Horse Co. *v.* Downen, Supreme Court of Colorado, ELLIOTT, J., November 7, 1892, 31 Pac. Rep., 501.

CONSTITUTIONAL LAW.

Cases selected by WILLIAM STRUTHERS ELLIS.

FEDERAL.

DUE PROCESS OF LAW.

1. *Amending Corporate Charter.*

Where a corporation was chartered, subject to amendment and repeal at the will of the general assembly, an act requiring corporations to pay employees' wages weekly, excepting from its provisions religious, literary and charitable corporations, is a reasonable exercise of the right to amend such a charter, and it is no objection to its constitutionality that such corporations were excluded as only had capital stock or existed for mere pecuniary gain; nor is any corporation a citizen of the United States, nor a person within the meaning of United States Constitution, Amendment 14, sec. 1; State *v.* Browne Mfg. Co., Supreme Court of Rhode Island, ROGERS, J., October 3, 1892, 25 Atlantic, 246.

EXTRADITION.

2. *Arrest and Trial for Different Charges.*

Under United States Constitution, Article IV, Section 2, which requires fugitives from justice found in a State other than the one in which the crime was committed to be surrendered on demand to the authorities of the State having jurisdiction of the offense, a fugitive who has been extradited on papers charging him with grand larceny may be tried under an indictment charging him with robbery when the two charges are based on the same facts; there being nothing in the Statutes of Congress regulating interstate extradition, or in the laws of the State from which the fugitive was extradited, prohibiting an arrest and trial on different charges: People *ex rel.*, Post *v.* Cross, Sheriff, Court of Appeals of New York, O'BRIEN, J., October 18, 1892, N. E. Rep., Vol. 32, p. 246.

IMPAIRING OBLIGATION OF CONTRACTS.

3. *Legislation Affecting Prior Judgments.*

The provision in the United States Constitution that "no State shall pass any law impairing the obligation of contracts," does not forbid a State from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in its courts; nor does a State statute of such character deprive the judgment creditor of his property without due process of law: Morley *v.* Lake Shore & Michigan Southern Railway Co., Supreme Court of United States, SHIRAS, J. (HARLAN, FIELD and BREWER, JJ., dissenting), November 14, 1892, 146 U. S., 162.

4. *Legislation Amending Former Act.*

Where a State Act chartering a railway company and making it lawful for the county court of any county to subscribe to the stock of said railway company is amended by a subsequent act which compels said courts to first submit the question of such subscription to a vote of the people, *held* that the latter Act does not violate the inhibition of the Constitution of the United States against "impairing the obligation of contracts" where the provisions of the former Act were not acted on prior to the passage of the latter: Wilson *v.* Polk County, Supreme Court of Missouri, GANTT, J., November 14, 1892, 20 Southwestern, 469.

INTERSTATE COMMERCE.

5. *Meat Inspection Laws.*

Following the ruling of Minnesota *v.* Barber (136 U. S., 313), it was *held*, that the Act of March 31, 1889, concerning the inspection before slaughter of cattle intended for human food, was in violation of the Constitution of the United States in so far as such act provided that fresh meats, sound, healthy and fit for human food, cannot lawfully be shipped into this State to be sold, except upon condition that the animal or animals from which such meats have been taken shall have been inspected and certified by the State inspectors within forty-eight hours before slaughter: Schmidt *v.* People, Supreme Court of Colorado, November 7, 1892, *per curiam*, 31 Pacific Rep., 498.

PRESIDENTIAL ELECTORS.

6. *Appointment of.*

Under the Constitution of the United States the legislatures of the several States have exclusive power to direct the manner in which the electors for president and vice-president shall be appointed. Congress having the power to prescribe the day on which presidential electors shall meet in the several States, and having fixed a certain day a State law in as far as it prescribes a different day is void: McPherson *v.* Blacker, Supreme Court of United States, FULLER, C. J., October 17, 1892, 146 U. S., 1.

STATE.

CLASS LEGISLATION.

7. *Stock Running at Large.*

A city ordinance which prohibits stock from running at large in certain portions of the city is not objectionable, on the ground that

it is class legislation. Special laws applicable to particular localities, highways and streets of a city are necessary to the safety and convenience of its citizens, and are valid, unless they are unreasonable, or violate fundamental law: Mayor, etc., of Chattanooga *v.* Norman, Supreme Courtof Tennessee, SNODGRASS, J., November 18, 1892, 20 Southwestern, 417.

EMINENT DOMAIN.

8. *Special Taxation.*

A city condemned land through the middle of two lots for an alley, and levied a special tax on said lots according to their frontage on such alley to pay for the land so taken. *Held*, that the proceedings were unconstitutional, as being an abuse of the power to enforce special taxation upon contiguous property for local improvements, and as taking private property for public use without just compensation: City of Bloomington *v.* Latham, Supreme Court of Illinois, MAGRUDER, J. (CRAIG, J., dissenting), November 2, 1892, 32 Northeastern, 506.

IMPRISONMENT FOR DEBT.

9.

A State Act providing that "it shall be unlawful for any person or persons, firms or corporations or companies, to refuse to cash any checks or script of their own that may be presented it within thirty days of its date of issuance," and making it "a misdemeanor for any person, etc., to refuse to redeem in lawful currency any such checks, etc.," violates the spirit if not the letter of that clause in the constitution of the State prohibiting the legislature from passing any law authorizing imprisonment for debt in civil cases." State *v.* Paint Rock Coal & Coke Co., Supreme Court of Tennessee, HENDERSON, Special J., November 19, 1892, 20 Southwestern, 499.

INALIENABLE RIGHTS.

10. *Interference with Right of Contracting.*

An Act which requires the operators and owners of coal mines, where the miner is paid on the basis of the amount of coal mined by him, to compute the compensation upon the weight of the coal unscreened and weighed on pit cars, is unconstitutional within the Constitution of Illinois, Article II, Section 2, as depriving persons without due process of law of the property right of making contracts: Ramsey *v.* People, Supreme Court of Illinois, BAILEY, C. J., October 31, 1892, N. E. Rep., Vol. 32, p. 364.

LEGISLATURE.

11. *Enactment of Statutes.*

Although the provisions of the constitution of a State forbid the legislature to pass any appropriation or revenue bill during the last five days of the session, their disregard by the legislature is beyond the reach of the courts, which deal only with what the legislature does, not with what it should have done or omits to do. Such provisions, while authoritative and mandatory on the legislature, are not for the consideration of the

courts, which must accept as legislative enactments, duly passed as prescribed by the constitution, all such acts as are duly authenticated as such in the mode prescribed by it. Hurt *v.* Wright, Sup. Ct. of Mississippi, October 15, 1892, CAMPBELL, C. J., 11 Southern, 608.

SPECIAL LEGISLATION.

12. *Tax Levied for County Institution.*

A State law which attempts to authorize any county of the State to raise money "by a tax upon all taxable property within the county," to secure the location therein of an institution to be controlled wholly by a board appointed by the governor, and which provides for the furnishing of information to the people of the State at large as to the work of such institution, exclusively by the board and State officers, at the expense of the State, is a law of a general and not a local character, notwithstanding incidental benefits may accrue to property near such institution by reason of its location, and such a law is unconstitutional as being in conflict with that clause of the constitution of the State of Ohio which provides that all taxes for general revenue for the State must be levied by a uniform rule upon all the taxable property within the State. Watson *v.* Commissioners of Wayne Co., Supreme Court of Ohio, SPEAR, C. J., November 1, 1892, 32 Northeastern, 472.

CRIMINAL LAW.

Cases selected by C. PERCY WILLCOX.

ASSAULT.

1. *Threats no Justification.*

One is not justified in committing an assault and battery on another who is making no hostile demonstration against him, although threats against the accused made by the person assaulted have been communicated to him: Martin *v.* State, 32 N. E., 595, Appellate Court of Indiana, Nov. 30, 1892, FOX, J.

EXTRADITION. See CONSTITUTIONAL LAW, 2.

2. *Trial for Different Charge.*

One extradited for grand larceny may be tried for robbery where the two charges are based on the same facts, there being nothing in the statutes of Congress or of the State from which the prisoner was extradited prohibiting an arrest and trial on different charges: People *v.* Cross, 32 N. E., 246, Court of Appeals of New York, October 18, 1892, O'BRIEN, J.

IMPRISONMENT FOR DEBT. See CONSTITUTIONAL LAW, 9.

INDICTMENT.

3. *Quashing.*

The fact that a stenographer was permitted to take notes before the grand jury is not sufficient ground for quashing an indictment, if no substantial rights of the accused were prejudiced thereby: Courtney *v.* State. 32 N. E., 335, Appellate Court of Indiana, November 16, 1892, BLACK, J.

4. *Sufficiency.*

It is sufficient in an indictment for larceny to describe the property stolen as "six dollars in money." Such a description is not repugnant to the provision of the Constitution guarantying to every person accused of crime the right "to demand the nature and cause of the accusation against him:" Randall *v.* State, 32 N. E., 305, Supreme Court of Indiana, October 27, 1892, McBRIDE, J.

LARCENY.

5. *Intent—Ownership.*

One who samples some bales of cotton by permission of the bailee, but with an intent to appropriate such samples to his own use, is guilty of larceny. The property in such cotton is rightly laid in the bailee, who had the custody thereof. State *v.* McRea, 16 S. E., 173, Supreme Court of North Carolina, November 17, 1892, CLARK, J.

MURDER. See EVIDENCE, 6, 7.

LIQUOR LAWS.

6. *Election of Offence for Conviction.*

In a prosecution for an unlawful sale of liquor, the State must elect upon which sale it will rely for a conviction where the evidence tends to show several sales: State *v.* Lund, 31 Pacific, 309, Supreme Court of Kansas, November 5, 1892, JOHNSTON, J.

NUISANCE.

7. *Vicious Dog.*

A dog which persistently assails people passing along a public road is a public nuisance, and may be killed by any person so assailed: Nehr *v.* State, 53 N. W., 589, Supreme Court of Nebraska, November 10, 1892, MAXWELL, C. J.

SUNDAY LAW.

8. *Sporting.*

Playing baseball on Sunday is "sporting" within the meaning of the statute punishing those "who shall on Sunday engage in sporting:" State *v.* O'Rourk, 53 N. W., 591, Supreme Court of Nebraska, November 10, 1892, MAXWELL, C. J.

CRIMINAL PRACTICE.

Cases selected by C. PERCY WILLCOX.

MOTION FOR NEW TRIAL.

1. *Evidence in Support of.*

In support of a motion for a new trial the defendant's counsel has a right to put in evidence a copy of a newspaper giving an account of the trial prejudicial to the prisoner, which was read to the jury before they decided on their verdict.

EQUITY.

Cases selected by ROBERT P. BRADFORD.

ACCIDENT AND MISTAKE.

1. *Mutual Mistake of Fact.*

Plaintiff indorsed certain papers, supposing them to be negotiable notes. Upon flight of the principal the plaintiff was called on for payment by a bank which had discounted the instruments, also supposing they were negotiable notes. Plaintiff, after paying a portion of the instruments, refused farther payment on the ground that they were not negotiable notes. In this he was sustained by the court. But in an action against the bank to recover the amount he had paid before discovering he was not liable it was *held* that he could not recover, since the mistake was made about a matter equally open to the inquiry of both parties and it was immaterial that plaintiff supposed that he was subrogated to certain security on such payment: Alton *v.* First Nat. Bank of Webster, Supreme Court of Massachusetts, October 22, 1892, HOLMES, J., 32 N. E. Rep., 228.

ACCOUNT.

2. *Co-Owners of Vessel.*

Matters of account between part owners of property belong to a court of equity, and the fact that such property is a vessel does not bring the case within the jurisdiction of a court of admiralty: The Larch, 3 Ware, 28, 34 and The Charles Heinge, 5 Hughes, 359, disapproved; The H. E. Willard, Circuit Court of the United States, District of Maine, October 8, 1892, GRAY, J., 52 Fed. R., 387.

3. *Right of Corporation Stockholder to Compel.*

In the absence of statutory authority a court of equity has no jurisdiction to dissolve a corporation, nor can a stockholder by suit in equity compel an accounting between the corporation and its creditors unless it appears that the business is conducted in bad faith, or that the interests of the stockholders would be promoted by a different policy: Wheeler *v.* Pullman Iron & Steel Co., Supreme Court of Illinois, October 31, 1892, SHOPE, J., 32 N. W. Rep., 420.

ADJUSTMENT.

4. *Subrogation of Purchaser at Judicial Sale.*

A purchaser at a void execution or judicial sale is entitled to be subrogated to the rights of those creditors to the payment of whose claims the purchase money has been appropriated, but the purchaser must show that such payment has been made; and an answer filed by the purchaser, in which he avers that the land was sold to satisfy creditors of the estate in which such homestead was claimed and asks to be subrogated to the rights of such creditors, is demurrable if it fails to show that the purchase money was appropriated to their claims: Bond *v.* Montgomery, Supreme Court of Arkansas, November 12, 1892, BATTLE, J., 20 S. W. Rep., 525.

CHARITIES, TRUSTS FOR.

5. *Validity.*

While the same particularity is not required in charitable trusts as in ordinary express trusts, yet it must sufficiently appear that the donor (testator) designed to establish a charity, and the object must be indicated with sufficient clearness to enable the court, by means of its settled doctrines, to carry the design into effect. Therefore, a bequest in trust for "the education of young men for the priesthood or to educate individual orphan boys or orphan girls" is void for uncertainty: Brennan *v.* Winkler, Supreme Court of South Carolina, November 3, 1892, MCGOWAN, J., 16 S. E. Rep., 190.

EQUITABLE ASSIGNMENT.

6. *Contingent Fee.*

There is a clear distinction between an actual assignment of a part of a fund and a mere promise to pay out of such fund. Consequently an agreement by a client to pay his attorney a reasonable compensation for his services, to be paid out of the proceeds of a proposed lawsuit, does not amount to an equitable assignment of an interest in the subject-matter of the litigation: Hall *v.* Culver, Supreme Court of Illinois, October 31, 1892, BAKER, J., 32 N. E. Rep., 265.

FORECLOSURE SUIT.

7. *Priorities.*

A lawyer employed by a railroad company at a fixed salary in a State where the road is in course of construction, but not yet in operation, is not entitled, on the appointment of a receiver in foreclosure proceedings, to receive payment out of the proceeds of the sale prior to the satisfaction of the mortgage bonds, even though earnings of the road have been improperly diverted from current expenses for the benefit of bondholders; for the equity to a return of diverted earnings applies only in favor of those who have helped to keep the road a going concern. Fosdick *v.* Schall, 99 U. S., 235, distinguished; Finance Co. of Penna. *v.* Charleston C. & C. R. Co. (Moon, intervener), Circuit Court of the United States, District of South Carolina, November 8, 1892, SIMONTON, J., 52 Fed. R., 526.

FRAUD. See PLEADING, 1; PROPERTY, 2.

8. *Trustee, ex-maleficio.*

One who breaks a promise to marry, by means of which she has obtained money from the plaintiff which she has invested in lands, becomes a trustee of the amount, and it will be made a charge on the lands so purchased. Edwards *v.* Culbertson, Supreme Court of North Carolina, November 22, 1892, SHEPHERD, C. J., 16 S. E. Rep., 233.

JURISDICTION.

9. *Dissolution of Corporation.* See ACCOUNT, *supra.*

MARRIED WOMEN, TRUSTS FOR.

10. *Separate Equitable Estate; Power to Control.*

A deed of settlement made by a *feme sole* in contemplation of marriage in trust for her sole and separate use provided, *inter alia*, that

the grantor should occupy the premises and receive all the rents and profits thereof "for the maintenance of herself and of any children that may be hereafter born to her." There were other provisions aimed at the exclusion of all marital rights of the husband. Subsequent to the marriage the wife joined her husband in encumbering the land by a deed of trust. *Held:* (1) that the power of a married woman over her separate equitable estate is absolute unless restrained expressly or impliedly by the instrument creating the estate; (2) that her life estate was properly bound, since the deed of settlement entitled her to the entire profits of the trust, and did not vest in the children any joint interest: Stace *v.* Bumgardner, Supreme Court of Appeals of Virginia, November 17, 1892, LEWIS, P., 16 S. E. Rep., 252.

EVIDENCE.

Cases selected by ARDEMUS STEWART.

ADMISSIBILITY.

1. *Evidence Illegally Obtained.*

The fact that letters were taken from defendant's room by a detective without authority of law, and without any warrant or order of Court, does not render them admissible in evidence for the prosecution: following Gindrat *v.* People (Ill. Sup.), 27 N. E. Rep., 1085; Siebert *v.* People, Supreme Court of Illinois, CRAIG, J. October 31, 1892, 32 N. E. Rep., 431

2. *Motion to Strike out Evidence.*

A motion to "strike out" evidence that has been introduced in a cause must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself. Where evidence has been introduced for a plaintiff that in itself is pertinent, relevant, legal and proper, so far as it goes toward making out the plaintiff's case, but which, in the conception of the opposite party, falls short, for want of proof of other necessary facts, of making out the plaintiff's case, the proper practice is either to get an instruction from the Court to the jury to the effect that no recovery can be had without proof of the missing facts, or else by a demurrer to the evidence (or a motion for a non-suit): Willcox *v.* Stephenson, Supreme Court of Florida, TAYLOR, J., November 3, 1892, 11 So. Rep., 659.

DOCUMENTARY EVIDENCE.

3. *Notice to Produce—Subpœna Duces Tecum.*

A postmaster cannot refuse to obey a subpœna to produce in court the record of his office containing the names of box-holders, on the ground that it would be contrary to the regulations of the Post-Office Department: Rice *v.* Rice, Court of Chancery of New Jersey, BIRD, V. C., October 28, 1892, 25 Atl. Rep., 321.

4. *Photograph.*

A photograph or other picture, proved to be a correct representation of physical objects as to which testimony is adduced, is admissible

in evidence for the use of witnesses in explaining their testimony, and thereby enabling the jury to understand the case more perfectly: Ortiz *v.* State, Supreme Court of Florida, RANEY, C. J., October 12, 1892, 11 So. Rep., 611.

HEARSAY.

5. *Admissions—Declarations of Grantor.*

In an action for obstructing a right of way, declarations of the original owner at the time he took down the fence on the premises, to the effect that the lane was "to be thrown out to a common and become unin-closed for the purposes of the public and for the purpose of going to the depot," are admissible as part of the *res gestæ*. So, also, a declaration, made either before or at the delivery of the deed, that "the land was to be dedicated for depot purposes and public uses:" Spencer *v.* New York and N. E. R. R. Co., Supreme Court of Errors of Connecticut, May Term, 1892, CARPENTER, J., 25 Atl. Rep., 350.

6. *Dying Declarations.*

Dying declarations can be given in evidence in favor of the accused: Mattox *v.* United States, Supreme Court of the United States, FULLER, C. J., November 14, 1892, 46 U. S., 140.

7. *Threats of Suicide by the Deceased.*

On an indictment for murder by poisoning, evidence of the deceased having within a year of his death and prior to his last sickness made threats of an intention to commit suicide, is incompetent where the declarations form no part of the *res gestæ*, nor are within the rule admitting dying declaration: Seibert *v.* People, Supreme Court of Illinois, October 31, 1892, CRAIG, J., 32 Northeastern, 431.

OPINION.

8. *Handwriting.*

Handwriting cannot be proved by comparison. In order to render a witness competent to testify as to handwriting he must be acquainted with the handwriting of the person charged to have written the disputed instrument, either from having seen him write, or having been acquainted with his writings in business transactions; but it is not necessary that he should directly state his familiarity with the party's handwriting. It is sufficient if this appears from his testimony: Riggs *v.* Powell, Supreme Court of Illinois, *per curiam*, November 2, 1892, 32 N. E. Rep., 482.

9. *Mental Condition—Non-expert Testimony.* See WILLS, 3.

Non-expert witnesses, who have known, frequently met and transacted business with a testatrix, and have observed her manner and appearance at the time of making the will and prior thereto, are competent to give their opinions as to her mental soundness at the time the will was executed, although they were unable to give in detail any conversation had with her: Appeal of Shanley, Supreme Court of Errors of Connecticut, ANDREWS, C. J., November 1, 1892, 25 Atl. Rep., 245.

When a witness has testified that she nursed a person during the last few days before his death, and gives testimony as to his appearance, actions and conversation, she is competent to give an opinion as to his sanity during his illness, as her testimony shows that she had sufficient opportunities of observation and means of knowledge on which to base an opinion: Mull *v.* Carr, Appellate Court of Indiana, CRUMPACKER, J., December 1, 1892, 32 N. E. Rep., 591.

10. *Question of Law—Opinion of Legal Profession.*

The opinion of the legal profession on a question, given and acted on for a great many years without litigation, is evidence of what the law on such questions is: Venable *v.* Wabash Western Ry. Co., Supreme Court of Missouri, SHERWOOD, C. J., November 14, 1892, 20 S. W. Rep., 493.

PRODUCTION OF EVIDENCE.

11. *Order of Testimony at Trial.*

The order in which testimony is offered is to be determined by the party offering it, where it is not shown to the court that some undue advantage of the adverse party is thereby attempted to be taken: McDaneld *v.* Lozi, Supreme Court of Illinois, WILKIN, J., October 31, 1892, 32 N. E. Rep., 423.

WITNESS.

12. *Contradicting.*

The rule that a party cannot discredit his own witness is not violated by proving facts contrary to the testimony of such witness: Chester *et al. v.* Wilhelm *et al.*, Supreme Court of North Carolina, MACRAE, J., November 29, 1892, 16 S. E. Rep., 229.

13. *Deceased—Evidence of Testimony at Former Trial.*

Where a party testifies in an action in the justice's court, and dies before the trial, on appeal to the Circuit Court evidence of what his testimony was is admissible: Lewis *v.* Roulo, Register of Deeds, Supreme Court of Michigan, GRANT, J., November 18, 1892, 53 N. W. Rep., 622.

14. *Non-resident—Stenographic Notes of Testimony at Former Trial.*

The testimony of witness given on a former trial, and taken down in full by an official court stenographer, is admissible in evidence upon another trial of the same issues between the same parties, when it appears that the witness is a non-resident, and not within the jurisdiction of the court: Minneapolis Mill Co. *v.* Minneapolis and St. L. Ry. Co., Supreme Court of Minnesota, MITCHELL, J., November 17, 1892, 53 N. W. Rep., 639.

MUNICIPAL CORPORATIONS.

Cases selected by MAYNE R. LONGSTRETH.

ELECTIONS.

1. *Preservation of Ballots.*

In a contest to invalidate an election returned as deciding to adopt county organization, on the ground of improper counting of illegal

votes, it was *held*, that while the ballots cast constitute the primary evidence to determine rights of the parties, it must appear that they were properly kept, and if they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed by the election officers: Albert *v.* Twohig, Supreme Court of Nebraska, MAXWELL, J., November 2, 1892, 52 N. W. Rep., 582.

HIGHWAYS. See CONSTITUTIONAL LAW, 7, 8; PROPERTY, 3, 9, 10.

2. *Change of Grade, Tax to Pay for.*

A railway located in a street may be specially taxed to pay for the improvement of the street by change of grade as being "contiguous property:" Supreme Court of Illinois, October 31, 1892, SHOPE, J., 32 N. E. Rep., 372.

3. *Opening—Estimating Damages.*

It is proper for the jury in estimating damages to plaintiff from the opening of a road through his land to take into consideration the special benefits which will accrue to plaintiff by such opening, and if they are great enough to counterbalance the injury, all damages are properly denied him. Kings *v.* Burford, Supreme Court of Missouri, GANTT, J., November 14, 1892, 20 S. W. Rep., 459.

LICENSE FEES.

4. *Recovery of Excessive Fees.*

Where a municipality in good faith, but under a misapprehension of the law, demands a greater sum than it is legally entitled to for a license to carry on a particular business, a person who, with knowledge of the facts and without fraud, duress or extortion, voluntarily pays the sum demanded, cannot recover back the excess: City of Camden *v* Green, Court of Er. and App. of New Jersey, November 14, 1892, DIXON, J., 25 Atl. Rep., 357.

PLEADING.

Cases selected by ARDEMUS STEWART.

ANSWER.

1. *Conclusion of Law.*

An answer in an action on a note given for the price of land, that plaintiff falsely and fraudulently represented that the land was desirably situated and of great value, is a conclusion of law where there is no statement of what the real facts constituting fraud were: Baker-Boyer National Bank *v.* Hughson *et al.*, Supreme Court of Washington, HOYT, J., October 22, 1892, 31 Pac. Rep., 423.

FOREIGN STATUTE.

2. *Materiality.*

In pleading a foreign statute it is only necessary to recite so much thereof as is material or necessary to the action or defense, and costs therefor will be limited to the number of sheets required for that purpose: Summerside Bank *v.* Ramsay, Supreme Court of New Jersey, WERTS, J., November 4, 1892, 25 Atl. Rep., 274.

PRACTICE.

Cases selected by ARDEMUS STEWART.

EQUITY.

INJUNCTION.

1. *To Try Title to Office.*

The title to a public office, and the right to exercise its functions, cannot be determined in an action for an injunction to restrain the exercise of such functions, but in proceedings in the nature of a writ of *quo warranto* only: Burke *v.* Leland *et al.*, Supreme Court of Minnesota, VANDERBURGH, J., November 23, 1892, 53 N. W. Rep., 716.

MANDAMUS.

2. *To Try Title to Office.*

When a candidate for an office has qualified, after being declared elected by the inspectors of election, mandamus does not lie to try the legality of his election: State *ex rel.* Mercer *v.* Sullivan *et al.*, Supreme Court of Wisconsin, CASSODAY, J., November 15, 1892, 53 N. W. Rep., 677.

RES JUDICATA.

3. *Successive Bills by Different Stockholders.*

When one stockholder in a corporation files a bill to enjoin the consummation of an agreement made by the said corporation with other parties, in which suit the corporation appears and answers, and the suit is regularly heard and decided, the decision of the questions at issue in that suit is conclusive as to similar questions raised in another bill filed by another stockholder to enjoin the consummation of the same agreement, in the absence of proof of fraud or collusion in the decision of the former suit: Willoughby *et al. v.* Chicago Junction Railways & Union Stockyards Co. *et al.*, Court of Chancery of New Jersey, GREEN, V. C., October 12, 1892, 25 Atl. Rep., 277.

LAW.

ACTIONS.

4. *Limitation of.*

When crops are overflowed by reason of a railway embankment, if the nature of the embankment was such that the injury complained of was uncertain and contingent, and such as might never happen, the damage was not original in the sense that it necessarily resulted from the erection of the embankment, and consequently the statute of limitations did not begin to run until the crops were destroyed: Following Ry. Co. *v.* Biggs, 12 S. W. Rep., 331; 52 Ark., 240; St. Louis, I. M. & S. Ry. Co. *v.* Yarborough, Supreme Court of Arkansas, MANSFIELD, J., November 19, 1892, 20 S. W. Rep., 515.

5. *Release of, Under Duress*

A release by plaintiff of a cause of action against defendant will not be held void because defendant threatened to "make complaint"

and "send him to State's prison" if he refused, when the threats did not specify any offence by plaintiff for which such imprisonment might have been had: Kruschke *v.* Stefan, Supreme Court of Wisconsin, PINNEY, J., November 15, 1892, 53 N. W. Rep., 679.

APPEARANCE.

6. *General, Effect of.*

A statement in the record that on the trial counsel appeared "for the defendants," will be presumed to mean for all the defendants who had answered, and in such case a general verdict for the defendants must be construed in favor of all of them: Adams *v.* Sundby, *et al.*, Supreme Court of Minnesota, MITCHELL, J., December 2, 1892, 53 N. W. Rep., 761.

MOTIONS. *To Strike Out Evidence.* See EVIDENCE, 2.

RES JUDICATA.

7. *Issues not Made by Pleadings.*

When the parties have, by consent, tried issues not made by the pleadings, they are bound by the result to the same degree as if the issues were within the pleadings: Erickson *v.* Fisher *et al.*, Supreme Court of Minnesota, MITCHELL, J., November 17, 1892, 58 N. W. Rep., 638.

TRIAL.

8. *Remarks of Counsel*

Counsel must be allowed a reasonable latitude of argument, and while it is improper for them to make appeals to the approval or disapproval of the public as a consideration to weigh with the jury, reliance must be placed upon the good sense and sound discretion of the trial judge to keep the remarks of counsel within due and proper bounds. To warrant the interference of the appellate court the remark must be one which is clearly prejudicial to the opposite party, and which can be justified under no possible theory of the case; and the court cannot fully judge of its propriety where the objectionable remark is presented to its view alone, dissevered from the context: Lake Erie, etc., R. R. Co. *v.* Middleton, Supreme Court of Illinois, BAILEY, C. J., November 2, 1892, 32 N. E. Rep., 453.

PROPERTY.

Cases selected by ALFRED ROLAND HAIG.

LAND.

CONTINGENT INTERESTS.

1. *Sale of.*

The owner of a contingent interest in land or money may sell it for such sum as may be agreed upon between himself and the purchaser, providing the latter does not stand toward him in a trust relation, and in making the purchase acts in good faith: Whelen *v.* Phillips, Supreme Court of Pennsylvania, STERRETT, J., October 3, 1892, 151 Pa., 312; 31 W. N. C., 53; 25 Atl. Rep., 44.

CONVEYANCE.

2. *Fraudulent.*

A man, in contemplation of a second marriage, who has made no representations as to his property as inducements for the woman to marry him, may convey to his children by the previous marriage, as a reasonable provision for them out of his estate, a valuable portion of his property; and the intended wife cannot have the conveyance set aside as a fraud upon her, though she were not advised as to its being made, if the grantor retain sufficient to insure reasonable support for himself and her during life, and for her after his death should she be the survivor: Alkire *v.* Alkire, Supreme Court of Indiana, OLDS, J., November 17, 1892, 32 N. E. Rep., 571.

DEED.

Constructive Notice in. See *Infra*, 5.

3. *Covenant of Seisin.*

A covenant of seisin is not broken by reason of the fact that the land conveyed is described as being in the city of Albany, when in fact, by reason of a prior change of the city limits, it lay in another town, if the grantor is seised of the land, and the description is sufficient to identify it. The name of a town is not necessarily such an essential and material part of the description in a deed that it cannot be controlled by the particularity of the rest of the description: Perry *v.* Clark, Supreme Judicial Court of Massachusettts, LATHROP, J., October 22, 1892, 32 N. E. Rep., 226.

4. *Deed, Presumption of.*

The signing, attestation and acknowledgment of a deed by the grantor, and the recording of it, raise a presumption of delivery which cannot be overcome by declarations of the grantor that the deed was not delivered. After the execution and delivery of the deed the vendor's possession of the land conveyed is in trust for the vendee, and the statute of limitations will not begin to run until the vendor asserts an adverse holding by some unequivocal act brought to the knowledge of the vendee: Ingles *v.* Ingles, Supreme Court of Pennsylvania, PAXSON, C. J., July 13, 1892, 150 Pa., 397; 30 W. N. C., 490.

5. *Exceptions to Grant.*

A recital in a deed excepting from the grant all lots which have been granted to any person for burial lots, is constructive notice to those claiming under said deed that the burial lots were excluded from the operation of the deed, although the deed of the burial lots was not recorded until after the deed containing the exception: Hancock *v.* McAvoy, Supreme Court of Pennsylvania, STERRETT, J., October 3, 1892, 151 Pa., 439; W. N. C., 258; 25 Atl. Rep., 48.

6. *Grant of Right of Sepulture.*

A grant of the exclusive right of interment or sepulture in certain burial lots subject to the regulations of a cemetery company, being a mere license and incorporeal hereditament, conveys no such interest in

the land as will support an action of ejectment: Hancock *v.* McAvoy, Supreme Court of Pennsylvania, STERRETT, J., October 3, 1892, 151 Pa., 460; 31 W. N. C., 257; 25 Atl. Rep., 47.

7. *Habendum Repugnant to Premises.*

A life interest granted by deed, which is so fully, circumstantially and precisely defined and limited in the premises that there can be no mistake as to the intention of the grantor, will not be enlarged to a fee by the provisions of a repugnant habendum: Karchner *v.* Hoy, Supreme Court of Pennsylvania, STERRETT, J., October 3, 1892, 151 Pa., 383; 31 W. N. C., 57; 25 Atl. Rep., 20.

8. *May be Declared a Mortgage.*

The intention which exists when a deed is executed controls its character, which a subsequent change of intention will not alter. If a deed, absolute on its face, is executed as a security, it will be declared to be a mortgage: Doughty *v.* Miller, Court of Chancery of New Jersey, VAN FLEET, V. C., October 18, 1892, 25 Atl. Rep., 153. See also Potter *v.* Langstrath, Supreme Court of Pennsylvania, MCCOLLUM, J., October 3, 1892, 151 Pa., 216; 31 W. N. C., 108; 25 Atl. Rep., 76; Reeder *v.* Trullinger, Supreme Court of Pennsylvania, HEYDRICK, J., October 3, 1892, 151 Pa., 287; 31 W. N. C., 103; 24 Atl. Rep., 1104; Blake *v.* Taylor, Supreme Court of Illinois, WILKIN, J., October 3, 1892, 32 N. E. Rep., 401.

EASEMENT.

9. *In Highway—Right of Abutting and Non-abutting Owners to Damages for Construction of Railroad—Measure of Compensation.*

The owner of property abutting a public highway owns to the middle of the street subject to the public right of travel thereon. If, therefore, a railroad is constructed in the street it is an appropriation of his estate therein, and an interference with access to the abutting property. But persons not owning abutting properties have only the right of travel in the street, and are only affected by its appropriation as are the public generally, and hence have no claim for damages against the railroad company. Where, therefore, a plaintiff owns land abutting a highway which a railroad company adopts for its roadway, he can recover for injuries to this tract; but he cannot recover consequential damages to another tract which does not abut on the highway, though the two tracts are connected by a right of way over intervening land of another owner: Penna. Co. for Ins. *v.* Penna. Sch. Val. R. R. Co., Supreme Court of Pennsylvania, WILLIAMS, J., October 3, 1892, STERRETT and MITCHELL, J J., dissenting, 151 Pa., 334; 31 W. N. C., 30.

10.

The entry of the State upon the land of an individual for the purpose of constructing a highway gives it an easement in favor of the public for purposes of travel, for which the owner is compensated. The land-owner still retains the fee, but the servitude imposed restricts his enjoyment of

it so that it cannot conflict with the public use. Whenever the abutting owner is subjected to an additional servitude, he becomes entitled to compensation for the actual injury sustained. If an elevated railroad is constructed above the highway, there may be no interference with the use by the abutting land-owner of the property subject to the public easement; but if the structure to an appreciable extent excludes light and air from the abutting house, or imposes an additional servitude, the railroad company must compensate him for the injuries thus arising from the construction of its roadway. If only the highway is covered by the elevated structure the measure of compensation is what has the railroad company added to the public easement, and what new burden has it imposed on the plaintiff's property abutting the highway: Jones *v.* Erie and Wyoming Valley R. R. Co., Supreme Court of Pennsylvania, WILLIAMS, J., October 3, 1892, 151 Pa., 30; 31 W. N. C., 1; 25 Atl. Rep., 134.

11. *Riparian Rights in Navigable Stream.*

The owner of land on the banks of a navigable river has no title to the water or the power to be derived therefrom. But if the advantages of his location, inseparable from the ownership of the land, are increased for the purposes of business or pleasure by the propinquity of the stream, they are as much his property as the land itself. By the diversion of the stream by a neighboring riparian owner his land may, therefore, be injured in a way not suffered by the public, and for this the neighboring owner must make him compensation: Williams *v.* Fulmer, Supreme Court of Pennsylvania, WILLIAMS, J., October 3, 1892, 151 Pa., 405; 31 W. N. C., 70; 25 Atl. Rep., 103.

INJURIES TO LAND. See PRACTICE, 4; TORTS, 11.
LATERAL SUPPORT. See TORTS, 6.
WATER RIGHTS.

12. *Water Supplied by Natural Force.*

A grant of certain land, "together with the privilege of drawing water from a pipe laid in the ground from a well," on adjoining land of the grantor, "as now used," the water being supplied by gravitation, gives the grantee the right to draw water whenever the well, remaining intact as a structure and capable of holding water, contains water which will gravitate to the grantee's land, but there is no stipulation that the latter shall receive an adequate supply, nor does the grant preclude the grantor from digging a reservoir on his land, though in so doing he cuts off the supply from the well: Davis *v.* Spaulding, Supreme Judicial Court of Massachusetts, BARKER, J., December 3, 1892, 32 N. E. Rep., 650.

13. *Water Supplied by Hydraulic Ram.*

Complainant contracted with defendant to purchase a portion of his land containing a stable and greenhouse, which were supplied with two continuous streams of water forced through an underground pipe from two hydraulic rams driven by waters of a spring on that part of the land retained by defendant. The hydraulic rams were in operation at the making of the contract, and although nothing was said with regard to the flow of water the purchaser considered it a substantial inducement to the

value of the property. On the day of the sale, some few hours before the delivery of the deed, at a place distant from the premises, the water was shut off: *Held*, that the flow of water so driven up by the rams was an apparent and continuous easement, which passed with the land conveyed as necessary for the beneficial use of the premises; and with it, as a secondary easement, the right to enter upon the land retained, to repair and maintain the rams, and that the defendant did not alter the complainant's rights by stopping the flow at the stable just before the delivery of the deed: Toothe *v.* Bryce, Court of Chancery of New Jersey, PITNEY, V. C., October 18, 1892, 25 Atl. Rep., 182.

MINES.

MINING CLAIM.

14. *Right of Alien to Hold.*

Mining interests and rights form no exception to the general rule that the right to defeat a title to realty on the ground of alienage is reserved only to the sovereign: Billings *v.* Aspen Mining and Smelting Company, Circuit Court of Appeals of United States, Eighth Circuit, SHIRAS, J., October 3, 1892, 52 Fed. Rep., 251.

MINERS' WAGES. See CONSTITUTIONAL LAW, 10.

STATUTORY REQUIREMENTS.

PROTECTION TO SHAFT. See TORTS, 5.

PERSONAL PROPERTY.

BANK DEPOSIT.

15. *Gift Inter Vivos.*

A deposit in bank in the name of "Julia Cody, or daughter, Bridget Bolin," does not warrant an inference of a gift to the latter; and though the daughter had possession of the book for several years and supported her infirm mother, in the absence of evidence of an intent to give and of delivery of the fund represented by the book the title thereto remains in the mother at her death: *In re.* Bolin, Court of Appeals of New York, GRAY, J., November 29, 1892, 32 N. E. Rep., 626.

TORTS.

Cases selected by HENRY N. SMALTZ.

DECEIT.

1. *Expression of Opinion.*

In an action on a note given for the price of land, the defence was that the plaintiff falsely and fraudulently represented the land to be of great value, and it appeared from the evidence that the plaintiff had stated that the land was of great value and desirably situated, it was held that this was a mere expression of opinion, and not a warranty: Baker-Boyer Nat. Bank *v.* Hughson *et al.*, Supreme Court of Washington, October 22, 1892, per HAY, J., 31 Pac. Rep., 423.

NEGLIGENCE.

2. *Abutting Owner, Liability for Defective Sidewalk.*

The owner who has constructed in front of his building a board sidewalk, leaving a circular opening covered with an iron plate for the purposes of his business, is liable in damages to one who is injured in passing over said sidewalk by striking the iron plate with her foot, slipping it out of place, and falling through the hole; and it is no defence to the action that the city is liable to the injured party: McDaneld *v.* Logi, Supreme Court of Illinois, October 31, 1892, per WILKIN, J., 32 N. E. Rep., 423.

3. *Defective Machinery.*

Although machinery may have a defect, yet if that defect does not interfere with the safe and proper use of the machiney with reference to the purpose for which it was constructed, an injury to an employee's hand while accidentally in contact with the defective part, but which was very likely to occur, cannot be attributed to negligence on the part of the company in the construction of the machinery: Richmond and D. R. R. Co. *v.* Dickey, Supreme Court of Georgia, October 24, 1892, per LUMPKIN, J., 16 S. E. Rep., 212.

4 *Irrigating Ditches, Failure to Repair.*

Where a Colorado statute provided that all owners of irrigating ditches should keep them in repair, and should be liable for all damages resulting from their refusal or neglect so to do, and defendant permitted a break in his ditch to remain unrepaired for three weeks, whereby plaintiff's land was overflowed, such conduct was negligence *per se* and defendant was liable: Catlin Land & Canal Co. *v.* Best, Court of Appeals of Colorado, October 24, 1892, per REED, J., 31 Pac. Rep., 391.

5. *Mine Owner, Willful Violation of Statutory Requirements.*

Where by statute the operators or owners of all coal mines were required to securely fence the top of each shaft by gates properly covering and protecting such shaft, and the willful violation of the requirements causing injury or loss of life to any person was made actionable, it was *held* that contributory negligence was no defence to a willful violation, and that by willful violation was meant a violation, knowingly and deliberately committed, to which the circumstance of the defendant having in good faith, for the protection of the entrance boarded and fenced it, and arranged the care and operation of it to act as a gate or covering for the shaft, such protection being sufficient to protect a person who should should exercise ordinary care, did not make the act of the defendant less willful: Catlett *v.* Young, Supreme Court of Illinois, November 2, 1892, BAKER, J., 32 Northeastern, 447.

6. *Municipal Corporations—Changing Grade of Highway.*

Where a city, informed of the loose character of the soil, excavated a street so negligently as to take away the support of an adjoining lot, causing the soil of the lot to slide into the street, the injury is direct, not consequential, and the owner can recover damages therefor from the city,

though the excavation was made before the adoption of any constitutional provision for the compensation of the owner of property taken or damaged for public use. The damages will cover injuries to the buildings also where the weight of the buildings did not contribute to the sliding of the soil: Parke *v.* City of Seattle, Supreme Court of Washington, October 11, 1892, STILES, J., 31 Pac. Rep., 310.

But see Dillon, Mun. Corp., Secs. 990 and 991, and cases cited.

Overflowing Lands. See

7. *Railway Companies—Failure to Signal.*

A New York statute providing that the engineer who fails to ring the bell or sound the whistle of a locomotive eighty rods before crossing a highway shall be guilty of a misdemeanor, imposes the duty of giving such signals solely on the engineer, and his failure to give them is not negligence in law on the part of the company: Vandewater *v.* N. Y. & N. E. R. R. Co., Court of Appeals of New York, November 29, 1892, per PECKHAM, J. (MAYNARD, J., dissenting), 32 N. E. Rep., 636.

8. *Railway Companies—Injury to Passengers.*

An electric railway company is not relieved from liability for damages for injuries upon a passenger by its negligence, by the fact that he had not paid his fare when he got on for the purpose of becoming a passenger and was willing to pay, and would have paid but for the failure of the conductor to come to him, he being obliged to stand upon the foot board owing to the crowded condition of the car: Cogswell *v.* West St. & N. E. Electric Ry. Co., Supreme Court of Washington, October 11, 1892, per STILES, J., 31 Pac. Rep., 412.

RAILWAY COMPANIES.

9. *Ejection of Passenger.*

Where a station agent refused to open a ticket office and told the applicant he could pay his fare on the cars, and he was forcibly ejected from the train because he had not enough money to pay the excess of fare required for not having a ticket, and was compelled to walk sixteen miles in the snow, and was injured from fatigue and illness caused thereby, the company is liable in damages: Lake Erie & W. Ry. Co. *v.* Cloes, Appellate Court of Indiana, November 30, 1892, per CRUMPACKER, C. J., 32 N. E. Rep., 588.

SLANDER.

10. *Privileged Communication.*

Where the business of an agent or an arbitrator was to appraise property and ascertain the state of accounts between landlord and tenant, a communication by the landlord to such agent at the time of requesting him to render his services, to the effect that the tenant had already stolen two bales of cotton, and he, the landlord, wished to get him off the premises before he stole any more, it not appearing that the accounts between the parties embraced the two bales of cotton or any part of their value, or any question concerning them, was irrelevant to the business in hand, and was therefore not a privileged communication: Jones *v.* Forehand, Supreme Court of Georgia, March 26, 1892, per SIMMONS, J., 16 S. E. Rep., 262.

TRESPASS.

11. *Railway Companies—Construction of Road.*

Where a railroad company constructs a ditch along its right of way, whereby it diverts surface water, collected in a large basin through which the road passse, from the direction in which it naturally flows, and thereby overflows land of an owner on the natural water course into which the surface water so diverted is finally emptied, the company is liable for the damage inflicted, and it is immaterial that the ditch was necessary to the operation of the road, and that it was carefully constructed: Jenkins *v.* R. R. Co., 15 S. E. Rep., 193, followed. Staton *v.* Norfolk & C. R. R. Co., Supreme Court of North Carolina, November 17, 1892, per SHEPHERD, J., 16 S. E. Rep., 181.

TROVER AND CONVERSION.

12. *Carriers of Freight.*

A carrier having received a quantity of fire-arms and ammunition for transportation to a place where a "strike" was in progress, consulted with the governor of the State, and under his advice did not deliver the goods to the consignee, a store-keeper, but retained them and carried them from the State. *Held:* in an action for their value (1) That a petition in an action for conversion states a sufficient cause of action where the plaintiff's ownership, the value of the goods, and the fact of the conversion is properly set forth, and an averment of a demand by the plaintiff, and a refusal by the defendant is not necessary. (2) The motive by which a party was controlled in the conversion of property is of no avail as a defense, though it may be shown when exemplary damages are claimed. (3) It is no defense to an action for the value of the goods that they were tendered to the plaintiff after the conversion, and then stolen without the negligence of the carrier. Baltimore & Ohio R. R. Co. *v.* O'Donnell, Supreme Court of Ohio, June 28, 1892, per WILLIAMS, J., 32 N. E. Rep., 476.

13. *Demand.*

Where it appeared that plaintiff and defendant had a flock of sheep in common running in defendant's pasture, and plaintiff asked defendant if it was not time for a division of the sheep and could get none; and six mouths later the plaintiff asked for a division and defendant said he did not know whether plaintiff had any sheep, but afterward admitted that he had sold them, it was *held* that the evidence was sufficient to establish a demand: Sylvester *v.* Craig, Supreme Court of Colorado, October 31, 1892, per HOYT, C. J. (31 Pac. Rep., 387).